IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1023 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHANGDABHAI J VASAVA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1023 of 1993

MR NITIN M AMIN for Petitioner No. 1

MR HH PATEL, APP for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 13/02/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. By way of this appeal u/S. 374 (2) of the Code of Criminal Procedure (for short 'Cr.P.C.') the appellant challenges the order of his conviction u/S. 302 of the Indian Penal Code (for short 'IPC') and incidental order of sentence of life imprisonment passed by the Ld. Addl. Sessions Judge, Bharuch, camp at Rajpipla in Sessions Case No. 59 of 1992 dated 23rd July, 1993.

2. The case of the prosecution stated in nutshell is as under :-

2.1. The incident in question took place on 5th December, 1991 at village Arethi in Bharuch district. Deceased Kaliya Nakatiya Vasava resided with his family comprising his son Devaji and four other sons and two daughters, wife and wife of Devaji. The deceased had a brother named Jethiyabhai and they jointly owned about 16 acres of agricultural land, out of which land, admeasuring 8 acres was given to the deceased. On the day of incident the deceased went out to graze his cattle. While he was near his field at about 11.00 a.m. the appellant alongwith several labourers came there. The appellant wanted to have wood of a teak tree which was lying in the field of deceased and he had therefore brought labourers to cut the tree into pieces with a view to shift them from that place. At that time the deceased told the appellant that as the tree which had been fallen down was standing on the boundary of his field, the Forest Officers would create problem for him and, therefore, appellant should not remove the tree from there. The reluctance on the part of the deceased to allow the appellant to carry the wood, enraged him to such an extent that he caused several injuries on the person of the deceased by means of an axe. One serious injury was caused on head and the other on the neck of the deceased. These were over and above four other minor injuries that were caused on the different parts of the body. As a result of these injuries, the deceased died almost instantaneously. Devaji, son of the deceased, who had also gone to graze cattle early in the morning at about 7.00 O'clock, returned home at 12.00 noon and he found that his mother and wife were crying. On inquiry, his mother Naviben informed him that he had overheard the family members of the appellant saying that appellant had killed the deceased on account of some dispute regarding teak wood. All the three i.e. Devaji, Naviben and Devaji's wife Dhanuben thereafter went to the field and found that the deceased had sustained several injuries

and he was dead. Devaji, therefore, went to Dediyapada Police Station and the P.S.O. in charge of the police station recorded the first information report and on the basis thereof he registered offence at C.R. No. I 136/1991. The investigation of the case was thereafter handed over to Mr. Dadubhai Kanajibhai, Head Constable attached to the Mojda Police Chowky under Dediyapada Police Station.

2.2. The aforesaid Head Constable got the panchnamas of scene of offence as well as inquest drawn, recorded the statements of Naviben, widow of the deceased and Dhanuben, wife of complainant Devajibhai. The Police Sub Inspector Jabbarbhai Hamirbhai attached to Dediyapada Police Station on 5/12/1991 had gone to Bharuch for firing practice and he returned in the evening to Dediyapada. On his return, Head Constable Dadubhai entrusted the further investigation to the P.S.I. He arrested the appellant on 6/12/1991 and also seized the weapon used for committing offence, namely blood stained axe in the presence of panchas. After drawing the panchnama of the person of the appellant, he was arrested and taken into custody. On 6/12/1991 the P.S.I. recorded statements of several persons who were acquainted with the facts of the case and also forwarded blood stained articles to the Forensic Science Laboratory for its report. On receiving the report from Forensic Science Laboratory, he submitted chargesheet against the appellant in the Court of the Ld. Judicial Magistrate First Class, Dediyapada, who in turn committed the case to the Court of Sessions as the offence u/S. 302 of the IPC is exclusively triable by the Court of Sessions.

3. At the trial the Ld. Addl. Sessions Judge framed the charge against the appellant for offence u/S. 302 of the IPC as well as for offence u/S. 135 of the Bombay Police Act on 7th October, 1992 at Exh. 3. The appellant denied the same and claimed to be tried.

4. During the course of the trial, the prosecution examined 10 witnesses and also placed reliance on documentary evidence such as the complaint, post mortem notes, report of the Forensic Science Laboratory and various panchnamas. On conclusion of the oral evidence, the appellant in his further statement recorded u/S. 313 of the Cr.P.C. was put all the circumstances appearing against him in the evidence to enable him to render any explanation, if he so desired. It seems that no specific case has been pleaded by him and his defence appears to be that of general denial.

5. At the end of the trial, the Ld. trial Judge found the appellant guilty of offence u/S. 302 of the IPC and sentenced him to suffer imprisonment for life and to pay fine of Rs.100/- in default further RI for 15 days. He, however, acquitted him of the offence u/S. 135 of the Bombay Police Act.

6. At the hearing of this appeal, Mr. N.M. Amin, Ld. counsel appearing for the appellant, submitted that the judgment and order of conviction and sentence passed by the Ld. trial Court are erroneous in as much as there is no evidence worth the name on record to base the conviction of the appellant. He has further stated that there is no evidence of the eye witnesses available as the witnesses which had been examined by the prosecution as witnesses to the incident, have turned hostile and have not supported the prosecution case. In absence of such direct evidence, no conviction can be based by merely relying on the extra-judicial confession which is alleged to have been made by the appellant to witnesses Naviben and Dhanuben. He has further submitted that the evidence of both these witnesses cannot be relied on because it suffers from inherent infirmities. According to him, there is even no indirect or circumstantial evidence which would connect the appellant with the offence. He has, therefore, submitted that this appeal deserves to be allowed and the appellant is required to be acquitted.

6.1. Mr. H.H. Patel, Ld. APP appearing for the respondent - State has supported the judgment and orders of conviction and sentence and has submitted that the trial Court was fully justified in placing reliance on the extra-judicial confession made by the appellant to two prosecution witnesses, namely Naviben and Dhanuben. He has further submitted that looking to the medical evidence, it is very clear that the deceased had received fatal injuries and those injuries were caused by none other than the appellant as he himself has admitted before the aforesaid two witnesses that fact. Mr. Patel has, therefore, submitted that considering the overall evidence on record including the medical evidence, the appellant has rightly been convicted for an offence made punishable u/S. 302 of the IPC and this appeal therefore, is required to be dismissed.

7. Both the learned counsels have taken us through the record of the case and have placed reliance on the evidence in support of their rival contentions. We have also scrutinised the evidence closely with a view to reappreciate it and to arrive at the proper conclusion.

8. With a view to establish that the deceased had died homicidal death, the prosecution has examined Dr. Kailasben Gopalbhai Patel P.W.1 Exh.19, who at the relevant time was attached to Civil Hospital at Bharuch as Medical Officer. She has stated in her evidence that on 5/12/1991 at about 10.30 p.m. she had received the dead body of Kaliya Naktiya from the Police Sub Inspector of Dediyapada Police Station for post mortem examination. Next day in the morning at about 8.00 O'clock she commenced the autopsy and completed it at 9.15 a.m. Whatever the external injuries that were noticed by this witness have been described in column no. 17 of the post mortem notes. They are as under :-

(i) Incised wound over Lt. parietal occipital region of scalp long dual in dimensions 5" + 1/2" brain deep blood clot present.
(ii) Incised wound extending below ear to back of neck oblique in dimensions 5" + 1/2" brain deep blood clot present. Skin, muscles, vessel carotid Jugular vein cut traditio - oesophagus out.
(iii) Incised wound over Lt. arm Ant. aspect 5" x 1/2" muscle deep, blood clot present.
(iv) Incised wound below inj (ii) about 1" + 1/2" muscle deep, blood also present.

The witness has also noted the internal injuries suffered by the deceased in the post mortem notes in column no. 19. The following internal injuries were found during post mortem examination :-

Incised wound over Lt. parietal occipital region of scalp 5" + 1/2"
Fracture (L) parietal (L) occipital region of scalp about 5" inside.

Blood clot present over brain over parietal occipital region (L) cut wound present over (L) parietal occipital region of brain about 5" in length.

The witness has also found semi digested food present in small intestine. In the opinion of the witness, the death of the deceased was due to shock following head injury and neck injury. She has stated in her evidence that all the injuries suffered by the deceased were antemortem and injuries nos.1 and 2 were capable of causing death of person in the ordinary course of nature. She has further stated that the person who received such injuries would die on the spot. In the cross-examination

by the defence, she has stated that the deceased must have died about 18 to 24 hours before the post mortem examination was commenced. She has further stated that the deceased must have consumed food about 2 to 4 hours prior to his death.

8.1. Considering the aforesaid medical evidence coupled with the inquest panchnama produced by the prosecution at Exh. 12, it is very clear that death of the deceased was homicidal and to that extent the finding arrived at by the trial Court is proper and we are in agreement with the same.

9. The next question that would arise is who is the author of these injuries. To establish that fact, the prosecution has examined 9 witnesses including the complainant and the Investigating Officer and two witnesses before whom the appellant is alleged to have made extra judicial confession. Devajibhai Kaliyabhai Vasava P.W.2 Exh. 21 is the son of the deceased and he has lodged the first information report in Dediyapada Police Station. He has stated in his evidence that he was staying with his father Kaliya Nakatiya, who owned agricultural land admeasuring about 8 acres on the outskirts of village Arethi. One Jethiya Nakatiya was the elder brother of Kaliya Nakatiya and uncle of the present witness. Jethiya also owned 8 acres of land and the total land was 16 acres. He has further stated that on 5th December, 1991 in the early morning he had gone to graze buffalos on the outskirts of the village and returned home at about 12.00 noon. When he came home, he found that his mother and wife were crying. On inquiry, his mother informed him that Bhangda Jethiya Vasava i.e. the appellant had killed his (complainant's) father. The witness further states that he, his mother and wife thereafter went to the field and found that on the boundary of the field his father was lying dead and he had sustained injuries on the head, neck and hand. He, therefore, went to Dediyapada Police Station and lodged complaint, which is at Exh. 22. According to the witness, the reason for assault was that the appellant wanted to cut the fallen tree of teak which was resented by the deceased and that enraged the appellant who delivered several blows on the deceased by means of an axe and killed him. In the cross-examination he has stated that he and his father both had been to graze cattle. However, they had gone to different places. He has further stated that he had not seen the incident personally and he came to know about it only when his mother and wife told him about it. Nothing further has been asked in the cross-examination to this witness by

the defence.

9.1. Naviben Kaliyabnhhai P.W. 3 Exh. 23 is the widow of the deceased Kaliyabhai. In her evidence she has stated that deceased Kaliyabhai was her husband. About one and half years back at about 11.00 O'clock the present incident had taken place near their field. According to her, deceased had gone to graze cattle and goats. When she alongwith her daughter-in-law Dhanu was sitting inside the house, they heard the shouts of appellant and they ran in that direction. On way the appellant met them and he told the witness that he had finished her husband. The witness further states that at that time the appellant was holding the blood stained axe in his hand. Thereafter, the witness and her daughter-in-law went to the field where the deceased was lying. The witness found that her husband was not able to speak. She also noticed that her husband had received injuries on head, neck and hand and all the injuries were bleeding when they reached there. She further states that when they reached the spot where the deceased was lying, they found several persons, namely Devla Ranviya, Kotniya Jethiya and Parsing Oliya present. Mariyo Dungariyo was also present there. They, however, did not have any talk with them. Shortly after their returning home Devaji arrived and he was told about the incident, who went to Dediyapada Police Station for lodging complaint. In the cross-examination this witness states that their house is situated near the western side of their grass land, at the distance of about 200 paces from the field of one Mathiya Jethiya. She has further stated that near the house of her elder brother-in-law Jethiya, houses of sons of Jethiya are situated. She has further stated that at about 11.00 O'clock when the incident took place she was preparing food for the children. Before going to the field for grazing cattle, her husband had not taken any food. She has further stated that complainant Devaji had gone to the scene of offence with them and while she and her daughter-in-law waited near the dead body, her son Devaji went to the police station for lodging complaint. In the cross-examination she has been confronted with her previous statement recorded by the police with a view to show that before the police she had not stated that they heard shouts of the appellant and that at the place where the incident took place Devla Ranviya, Kotniya Jethiya and Parsing Oliya were present.

9.2. Dhanuben Devaji Vasava P.W.4 Exh. 24 is the wife of complainant Devaji. In examination-in-chief she has repeated the story which had been told by her mother-in-law in her evidence and she has corroborated

the fact that the appellant had met them on way to their field and he had told her mother-in-law that her husband was finished and at that time he was holding blood stained axe. In the cross-examination by the defence she has stated that when she and her mother-in-law went to the field, complainant was with them. The defence has also by putting questions pertaining to the topography of the area tried to bring on record the fact that the house of the deceased is situated at a far distance from the scene of offence and these two ladies could not have heard the shouts of the appellant.

9.3. The prosecution has also examined Devnabhai Ranliya Vasava P.W. 5 Exh. 25, Bhangdabhai Jethiyabhai Vasava P.W.6 Exh. 26, Parsing Oliya P.W.7 Exh. 27, Vechanbhai Devanbhai Vasava P.W. 8 Exh. 28, etc. However, there is no need to discuss the evidence of these witnesses because they have turned hostile and not supported the prosecution. Vechanbhai Devanbhai Vasava P.W.8 Exh. 28 is examined with regard to the production of blood stained axe in the police station on 6th December, 1991 in presence of the panchas. However, this witness has initially supported the prosecution, but in the cross-examination he has completely destroyed the prosecution case regarding voluntary production of the axe by the appellant. He has stated in the cross-examination that the appellant was never there in the police station when he went there. Only the blood stained axe was lying and the panchnama was kept ready in which he endorsed his signature.

9.4. Dadubhai Kanajibhai P.W.9 Exh. 30 was Head Constable at the relevant time attached to Mojda Police Chowky under Dediyapada Police Station. On 5th December, 1991 while he was on duty, he was entrusted with the investigation of this case by the P.S.O. Dediyapada Police Station. During the course of investigation, he arranged to draw the inquest panchnama and also panchnama of scene of offence. He thereafter recorded the statements of prosecution witnesses Naviben and Dhanuben. In the evening when the P.S.I. attached to Dediyapada Police Station returned from Bharuch, the further investigation was entrusted to him by this witness. In the cross-examination the witness is shown the statement of Naviben Kaliyabhai which was recorded by him and after perusing the same, he had stated that the following facts were not stated by the witness in her police statement, namely "that while she and her daughter-in-law were sitting in the house, they heard shouts of the appellant" nor she had stated before the police "that when they went to the field Devla Ranviya, Kotniya Jethiya and Parsing

Oliya were present.

9.5. Jabbarbhai Hamirbhai P.W. 10 Exh. 31 has stated that on 5th December, 1991 he was attached to Dediyapada Police Station and on that day he had gone to Bharuch for firing practice. In the evening when he returned the remaining investigation in this case was entrusted to him by Head Constable Dadubhai. During investigation he arrested the appellant and got the axe produced. He also recorded statements of various persons including the so called eye witnesses and on completion of the investigation he submitted chargesheet against the appellant in the Court of Ld. Judicial Magistrate First Class, Dediyapada. In the cross-examination nothing has been elicited by the defence which would nullify what he had stated in the examination-in-chief.

10. Considering the overall evidence of these witnesses, it clearly appears that there is no direct evidence available to connect the appellant with the crime. As already stated above, the witnesses who are alleged to have seen this incident have not supported the prosecution and they have turned hostile. In that view of the matter, we cannot place any reliance on their evidence. The prosecution has, therefore, sought reliance on the extra-judicial confession made by the appellant before Naviben and Dhanuben. If the evidence of these two witnesses is considered carefully, it would show that the same is not reliable and that they have falsely stated before the Court that they heard shouts of the appellant and they started going to their field and on the way the appellant met them and he made confession regarding his act to them. Looking to the distance between the two places, it is not possible that they would be able to hear the shouts of the appellant. Naviben has not stated before police that they heard the shouts of the appellant. Moreover, in the complaint, complainant Devajibhai has stated that his mother informed him about the incident when he came home and she also informed him that she came to learn about the incident by overhearing the talks which were going on amongst the relatives of the appellant. It may be noted here that so far these witnesses i.e. Naviben and Dhanuben are concerned, they have stated that they only heard the shouts and, therefore, they started for going in that direction and on way, appellant met them and told them about the crime he had committed. The complaint is the first in point of time wherein the source of information received by witness Naviben is made very clear. Her story and that of the witness Dhanuben therefore, does not tally with the version regarding

involvement of the appellant in the crime given in the complaint. There is one more factor which would dissuade us to accept the evidence of these witnesses. According to these witnesses complainant Devaji went with them to the field and while they were sitting near the dead body he went to Dediyapada Police Station for lodging the complaint. It may be noted here that the incident happened at about 11.00 O'clock. According to Devaji he returned home after grazing cattle at 12.00 noon and after listening to the story of his mother, they started going to the field. Naturally it would around 12.15 to 12.30 afternoon by then. It is impossible to imagine that the appellant after committing such murder would wait there for one and half hour and then inform the witnesses about the incident. Secondly, that if Devajibhai was with these witnesses, namely, Naviben and Dhanuben, this witness would also be in a position to hear what the appellant had stated to Naviben. He does not say anything about it. On the contrary, his case is that when he came home he learnt about incident from his mother. There is another factor which would render the evidence of Naviben doubtful is that according to her the deceased before leaving to graze cattle had not consumed any food and she has very firmly stated that except the food which was taken by him on previous evening, he had not taken any food thereafter. In the opinion of the doctor, the semi digested food which was found from the stomach of the deceased at the time of post mortem examination, which according to the doctor, the deceased would have consumed about 2 to 4 hours prior to his death. Meaning thereby before going to graze cattle the deceased might have consumed food. All these circumstances render the evidence of these witnesses very doubtful and the extra-judicial confession made to them cannot be accepted in light of the discrepancies appearing in their evidence. Since the prosecution has failed to prove guilt of the appellant by any direct evidence and since the other evidence sought to be relied on by the prosecution to secure conviction of the appellant is totally unreliable, there is nothing on record to connect the appellant with the crime. In other words, in our opinion, the prosecution has not been able to prove the fact that it was the appellant and the appellant alone who had committed this act. In that view of the matter, in our opinion, the conclusion reached by the trial Court finding the appellant guilty of an offence u/S. 302 of the IPC is erroneous and requires to be set aside.

11. In the result, the appeal deserves to be allowed and it is hereby allowed and the judgment and order of

conviction and sentence passed by the Ld. Addl. Sessions Judge, Bharuch, camp at Rajpipla dated 23/7/1993 in Sessions Case No. 59 of 1992 are hereby quashed and set aside. The Jail Authority is directed to set the appellant at liberty forthwith unless he is required for any other purpose. Fine, if paid, to be refunded to the appellant.

Muddamal articles to be disposed of in terms of the direction given by the Ld. trial Judge in the impugned judgment.

[K.R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.